United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 75-4016

B
P&S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DEE KNITTING MILLS, INC.; DIPPY KNITS, INC.; AND THREE D KNITTING MILLS, INC.,

Respondents.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

MICHAEL S. WINER,
DAVID S. FISHBACK,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

AUTHORITIES CITED

Cases:

Statute: Page

Miscellaneous:

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4016

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DEE KNITTING MILLS, INC.; DIPPY KNITS, INC.; AND THREE D KNITTING MILLS, INC.,

Respondents.

On Application for Enforcement of an Order of The National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUES

1. Section 10(e) of the Act bars the Company from contesting the Board's Section 8(a)(2) findings and almost all its Section 8(a)(1) findings.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging 19 employees because of their Union activities.

4. Whether the Board properly issued a bargaining order as a remedy for the Company's unfair labor practices.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*), for enforcement of its order against Dee Knitting Mills, Inc.; Dippy Knits, Inc.; and Three D Knitting Mills, Inc. The Board's decision by former Chairman Miller and Members Jenkins and Penello issued on November 19, 1974, and is reported at 214 NLRB No. 138 (A. 32-39).[1] This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Farmingdale, New York.

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Business of the Companies

Dee Knitting Mills, Inc., Dippy Knits, Inc., and Three D Knitting Mills, Inc., are all located at 1650 New Highway, Farmingdale, New York. Dee Knitting Mills manufactures sweaters; Dippy Knits distributes the

---

[1] "A." references are to pages of the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. Occasional "Tr." references are to pages of the original transcript before the Administrative Law Judge. Where the Appendix references in the Statement of Facts refer exclusively to the Administrative Law Judge's decision, the factual matter referred to was not contested by the Company in its exceptions to the Board.

products; and Three D Knitting Mills fabricates knit goods and related products. The three corporations constitute a single enterprise (hereinafter referred to as "the Company"). Vincent DiBartolo is president of all three corporations; his brother, Calogero "Charles" DiBartolo, is secretary-treasurer of Dee and secretary of the other two corporations; and brother Salvatore DiBartolo is a director of Three D (A. 3). Robert Lipsenthal, an officer and director of Dippy, is deeply involved in the personnel and labor relations problems of Dee (A. 4).

B. The Company Responds to the Organizational Efforts of Two Different Unions

In late June 1973[2] Local 231 of the Industrial Trade Union, AFL-CIO, passed out union literature in front of the Company's plant. Around that time, the International Brotherhood of Teamsters also passed out literature at the plant. The Company responded by holding meetings with the employees in June and July at which Vincent and Charles DiBartolo[3] and Lipsenthal told employees not to sign up with a union and declared that if the employees wanted a union they should speak to the DiBartolos so that the matter could be worked out "between ourselves". At the June 25 meeting these speakers told the employees that they would get a raise in July, and announced that the employees would get a bonus and a party at Christmas. The employees were also told that if a union came in they would no longer be able to purchase Company sweaters at discount and that the Company would put a lock on the door and the employees would be out on the street (A. 8-9). Furthermore, the Company

---

[2] All dates hereafter are in 1973.

[3] References to "the DiBartolos" collectively are to Vincent and Charles DiBartolo, and not to the other brother, Salvatore.

officials told the employees that "we have got connections, we are going to find out who the people are that signed for this union and we are going to get rid of them," and "look, make up your mind if you want a union or you want to work in here; you can't have both" (A. 8-9).

In July, Charles and Vincent DiBartolo told employee Mary Dorio that if the employees wanted a union, the Company "would bring [its] own union in" (A. 9). During that same month the DiBartolos summoned employee Ella Santiago into the office and accused her of "putting the union into the girls' heads." Charles DiBartolo threatened her that if the shop were unionized he would be a "bitch" and that the Company would seek to increase the size of the work force so that the employees would be laid off more often. At that time Santiago was also given a raise in pay (A. 9). In early July, Vincent DiBartolo asked employee Paula Limery if she had previously belonged to a union. When Limery responded that she had, DiBartolo said that unions were a bunch of racketeers, and that they were good only for big companies but not for small companies. On several occasions, Company officials took union literature from the hands of employees arriving at the plant and ripped it up (A. 9).

C. The Organizational Drive of the ILGWU

Early in August, a third labor organization, the International Ladies' Garment Workers' Union, AFL-CIO, and its Local 107 (hereafter "the Union or "the ILGWU") began organizing the Company's employees. Employee Barbara Laufman, assisted by Union manager Ed Banyai and Union agent Mary Ruggiero, recruited employees for the Union. Laufman, a paid Union organizer, had begun working for the Company in June (A. 17; 178-185). Shortly after the campaign began, Vincent DiBartolo asked newly hired employee Elvira Romano if she belonged to the Union (A. 9, 21).

The Union conducted meetings for interested employees on August 14, August 27, September 12, and September 19 (A. 9; 60-61, 71, 103, 109, 112, 142, 149, 163, 187). At the September 19 meeting, Banyai spoke to the employees. After it , determined that a majority of the Company's employees had signed Union authorization cards, it was agreed that Banyai, Ruggiero, and a committee of employees would go to the plant the next morning to request the Company to recognize the Union as the employees' collective bargaining representative. The employees selected for the Committee were Gloria Maurice, Ethel Fitzpatrick, Betty Benvenuto, and Freda Tarsky (A. 9-10; 40-46, 48, 51, 61, 71, 86-87, 109, 150, 163-164). Large, green ILGWU buttons were distributed (A. 10; 47, 61-62, 71-72, 78, 87, 101, 103, 110, 112, 120-121, 142, 150, 164, 187). Banyai asked the the employees to put them on after the Committee went in to meet with Company officials (A. 10; 78, 101, 121, 150).

D. The Company Responds to the ILGWU's Recognition Request by Discharging 19 ILGWU Supporters

Shortly before 8:00 a.m. on September 20, Banyai, Ruggiero, and the Committee met in the plant parking lot. They entered the plant through the employees' entrance, and walked through the shop. Many of the employees at work put on the ILGWU buttons at that time. Banyai knocked on the office door, and he and the others were let into the office. Charles and Vincent DiBartolo, Lipsenthal, and Company Supervisor Tramuta were present. Banyai said that the Union represented a majority of the unit employees, was willing to prove its majority through a neutral third party, and wished to meet and negotiate an agreement (A. 10; 164-165). Charles DiBartolo responded that he had no

time to meet and ordered them to "get out." One of the DiBartolos[4] said, "These people don't belong here, they are all fired," and one said that he would "close the shop as of this moment" (A. 10-11; 165). Lipsenthal told Banyai, "You get out of the shop, we want you out of here right away and go out the front way and the workers should go out the back way" (A. 11; 166). Lipsenthal then turned his attention to employee Tarsky and said, "You talk with a forked tongue, you told me you don't like unions. Get out, you are fired" (A. 11; 93). Banyai cautioned the Company officials to calm down, and admonished them that they were violating federal labor laws. Banyai then told the Committee members to go into the shop to work; Banyai and Ruggiero then left through the front door (A. 10-11; 62-63, 66-68, 72, 87-88, 92-93, 152-155, 164-166).

The Committee then went into the shop, where approximately 17 employees (including the Committee members) were wearing the green Union buttons. The DiBartolos then burst into the work area and shouted, "Everybody out, everybody with green buttons on, get out," and, "All the ones that are wearing buttons, you are all fired" (A. 11; 63, 73, 76, 78-79, 88, 95, 98, 102, 103, 107, 110, 112, 117, 121, 123, 143, 189-190). When employee Santiago got up to leave, Charles DiBartolo told her she could stay. Santiago said, "I am one of them, I have the button on." DiBartolo's response was to tell her to get out (A. 11; 101-102). Vincent DiBartolo told employee Philomena Laritza to get out, as she was about to put on her button (A. 11-12; 110). Charles DiBartolo declared that he would "put a lock on the door before a union will get in here (A. 11; 88). Lipsenthal came into the shop after the DiBartolos

---

[4] Vincent and Charles DiBartolo are twins, and at times this fact made it difficult to determine which of the two made a given statement (A. 116).

and again told Tarsky that she spoke with a "forked tongue." He added that if she were not a woman he would know what to do with her (A. 11; 78, 93).

The discharged employees left the shop and went out into the parking lot. Employee Doris Tramont, who was wearing a Union button, was already in the lot. She had gone there to put something in her car at the time of the recognition request. As she was returning to the shop, Tramont met her co-workers coming out, and when she was told what had occurred, she stayed outside with them (A. 11-12; 126-127). Lipsenthal followed the employees out, told them again that they were fired, and ordered them off the Company's property and into the "gutter where [they] belong[ed]" (A. 12; 122, 79, 95, 98, 102, 107, 117, 126-127, 143, 156, 167, 191).

By that time, Banyai and Ruggiero had come around to the parking lot. Lipsenthal told Banyai to "come over here." When Banyai declined, Lipsenthal said, "Well, I will have someone take care of you" (A. 12; 122, 156, 167).

E. The Union's Supporters Strike; Company Representatives Engage in Threats and Physical Violence; and the Company Recognizes Another Union

Later that morning the Union sent the Company a telegram, which read as follows (A. 12; 49, 168-170):

> To employers, confirming our visit today, repeat demand for recognition as collective bargaining agent for Dee Knitting Mills, Inc. production and maintenance workers. We are prepared to prove our majority status. This is a continuous demand.

time to meet and ordered them to "get out." One of the DiBartolos[4] said, "These people don't belong here, they are all fired," and one said that he would "close the shop as of this moment" (A. 10-11; 165). Lipsenthal told Banyai, "You get out of the shop, we want you out of here right away and go out the front way and the workers should go out the back way" (A. 11; 166). Lipsenthal then turned his attention to employee Tarsky and said, "You talk with a forked tongue, you told me you don't like unions. Get out, you are fired" (A. 11; 93). Banyai cautioned the Company officials to calm down, and admonished them that they were violating federal labor laws. Banyai then told the Committee members to go into the shop to work; Banyai and Ruggiero then left through the front door (A. 10-11; 62-63, 66-68, 72, 87-88, 92-93, 152-155, 164-166).

The Committee then went into the shop, where approximately 17 employees (including the Committee members) were wearing the green Union buttons. The DiBartolos then burst into the work area and shouted, "Everybody out, everybody with green buttons on, get out," and, "All the ones that are wearing buttons, you are all fired" (A. 11; 63, 73, 76, 78-79, 88, 95, 98, 102, 103, 107, 110, 112, 117, 121, 123, 143, 189-190). When employee Santiago got up to leave, Charles DiBartolo told her she could stay. Santiago said, "I am one of them, I have the button on." DiBartolo's response was to tell her to get out (A. 11; 101-102). Vincent DiBartolo told employee Philomena Laritza to get out, as she was about to put on her button (A. 11-12; 110). Charles DiBartolo declared that he would "put a lock on the door before a union will get in here (A. 11; 88). Lipsenthal came into the shop after the DiBartolos

---

[4] Vincent and Charles DiBartolo are twins, and at times this fact made it difficult to determine which of the two made a given statement (A. 116).

and again told Tarsky that she spoke with a "forked tongue." He added that if she were not a woman he would know what to do with her (A. 11; 78, 93).

The discharged employees left the shop and went out into the parking lot. Employee Doris Tramont, who was wearing a Union button, was already in the lot. She had gone there to put something in her car at the time of the recognition request. As she was returning to the shop, Tramont met her co-workers coming out, and when she was told what had occurred, she stayed outside with them (A. 11-12; 126-127). Lipsenthal followed the employees out, told them again that they were fired, and ordered them off the Company's property and into the "gutter where [they] belong[ed]" (A. 12; 122, 79, 95, 98, 102, 107, 117, 126-127, 143, 156, 167, 191).

By that time, Banyai and Ruggiero had come around to the parking lot. Lipsenthal told Banyai to "come over here." When Banyai declined, Lipsenthal said, "Well, I will have someone take care of you" (A. 12; 122, 156, 167).

E. The Union's Supporters Strike; Company Representatives Engage in Threats and Physical Violence; and the Company Recognizes Another Union

Later that morning the Union sent the Company a telegram, which read as follows (A. 12; 49, 168-170):

> To employers, confirming our visit today, repeat demand for recognition as collective bargaining agent for Dee Knitting Mills, Inc. production and maintenance workers. We are prepared to prove our majority status. This is a continuous demand.

That afternoon the employees set up a picket line with signs saying that they were on strike over unfair labor practices (A. 12; 74, 93, 95, 98, 102, 107, 110, 113, 156, 191-192). Also that afternoon supervisor Tramuta told a group of employees that if the Union came in, they were "going to go down the drain" (A. 12).

The next day, September 21, the DiBartolos and Lipsenthal met with Banyai, Ruggiero, and the Committee at the Union's office in the morning (A. 12-13; 65, 68-69, 89-91, 158-161, 171-175). The discussion focused on the unfair labor practices of the preceding day. Banyai stated the Union's position that the discharged employees should be reinstated with backpay and that appropriate notices should be posted. The Company officials voiced their concern that the Company was not strong financially. At one point Charles DiBartolo asserted that if he did not get his way, he would "close the doors," and one of the DiBartolos announced that he would rather close the shop than sign anything (A. 13; 160-161, 174). Nothing was resolved at the meeting.[5]

About noon, September 21, Salvatore DiBartolo sped his car into the plant driveway and hit picketing employee Rosetta Lyons, knocking her unconscious. Salvatore DiBartolo did not stop. He parked his car, and went into the plant. Company officials then came outside, and an ambulance was summoned to take Lyons to the hospital (A. 13; 79-80, 95-96, 104-105, 107-108, 113-114, 127-129, 144-145, 193-194). When Salvatore reappeared outside a little while later, Charles DiBartolo told him not to worry because he was covered by insurance (A. 96, 194). Lyons later filed civil and criminal complaints against Salvatore (A. 13; 96, 145, 148, 211-212).

---

[5] Late on September 21 the Company sent the dischargees letters offering them reinstatement, which should have been received by September 22 (A. 13). On September 26 the Company's attorney met with Banyai, Ruggiero and a Union attorney. The Company's unfair labor practices were discussed but no settlement was reached (A. 13; 161-162).

During September and October, Company supervisor Charles Reina distributed authorization cards for Local 550, International Union of Maintenance and Production Employees ("Local 550"), among the employees. In late October or early November, Local 550 official Sam DeBenedictis met with Reina and Charles and Vincent DiBartolo. At that meeting the Company extended recognition to Local 550 (A. 14-15).

The ILGWU continued its strike. On November 9, Company supervisor Charles Reina seized a Union picket sign and took it into the plant; the picketers had to bring in the police to retrieve it (A. 22; Tr. 781-783). About a week later, Reina became angry at employee Laufman for speaking to a truck driver about honoring the picket line. He threatened Laufman with injury and had to be physically restrained from going after her (A. 22; Tr. 786, 788-789). On several occasions, Reina used the Company sprinkler system to interfere with the picketers by causing water to accumulate where they were walking (A. 22; Tr. 789-791).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by threatening its employees with reprisals, including plant closure; by coercively interrogating its employees about their union membership; by promising benefits and granting a wage increase to dissuade employees from supporting union representation; by suggesting to employees that the Company would supply a union for them, and by interfering with lawful strike activities by means of violence and threats (A. 21-22, 34-35). The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging 19 employees because of their support for the Union (A. 23). The Board also found that the Company violated Section 8(a)(2) and (1) of the Act by

soliciting employees to sign authorization cards for Local 550 and by recognizing Local 550 as the employees' bargaining representative (A. 22). Finally, the Board found that the Union had majority support in an appropriate unit when it sought recognition on September 20, 1973, and that the Company's violations of the Act rendered the possibility of a fair election remote (A. 24).[6]

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights (A. 27-28). Affirmatively, the Board ordered the Company to withdraw and withhold recognition from Local 550, so long as Local 550 is not the certified bargaining representative, and to recognize and bargain with Local 107 of the ILGWU, upon request.[7] The Board's order further requires the Company, upon application, to reinstate its striking employees to their former or substantially equivalent positions, to make whole the employees discharged by the Company on September 20 for any loss of pay until September 22, the date of the Company's offer of reinstatement, and to post the usual notices (A. 25, 28).

---

[6] The Board (Chairman Miller dissenting) reversed several findings of the Administrative Law Judge. The Board, contrary to the Judge, found that employee Barbara Laufman should be included in the unit, found that the Company discriminatorily discharged employee Doris Tramont in violation of Section 8(a)(3) and (1) of the Act, and found that certain Company conduct and statements directed to employee Ella Santiago violated Section 8(a)(1) of the Act (A. 33-37).

[7] As indicated above, the Board upheld the Administrative Law Judge's determination that a bargaining order was warranted. However, applying its recent decision in *Steel-Fab, Inc.*, 212 NLRB No. 25 (1974), 86 LRRM 1474, the Board (Member Jenkins dissenting) reversed the Judge's findings of a separate Section 8(a)(5) violation (A. 36).

ARGUMENT

I. THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (2) OF THE ACT ARE ENTITLED TO ENFORCEMENT

A. Section 10(e) of the Act Bars From Challenge Before This Court Almost All the Board's Findings of Section 8(a)(1) Violations as Well as the Board's Section 8(a)(2) Findings

Section 10(e) of the Act states that "No objection that has not been urged before the Board . . . shall be considered by the Court . . . [absent] extraordinary circumstances." It is well settled that in the absence of "extraordinary circumstances" the failure or neglect of a respondent to urge an objection in the Board proceeding forecloses judicial consideration of this objection in enforcement proceedings. *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961) and cases there cited. In the instant case, the Company failed to file exceptions to almost all the Administrative Law Judge's findings of Section 8(a)(1) violations and all his findings of Section 8(a)(2) violations (A. 31-22). Accordingly, these determinations, which the Board adopted, are not in issue.

These unexcepted to findings reveal that the Company committed classic, but crude, unfair labor practices designed to prevent the employees from exercising their rights under the Act. As shown in the Statement of Facts, the Company's widespread violations of Section 8(a)(1) of the Act occurred both before and after its mass discharge of supporters of the Union on September 20 (discussed *infra* pp. 14-16). For example, between late June and August, the Company reacted to the organizational efforts of both the Teamsters and Local 231, Industrial Trade Union, AFL-CIO, by threatening its employees with reprisals including plant closure, by ripping

up union literature, by unlawfully promising benefits to dissuade employees from union support, and by telling employees that if they wanted a union, they should speak to their bosses who would bring a union in.

Moreover, immediately following the mass discharges, Company officer Charles DiBartolo threatened that the plant doors would be locked before the ILGWU got in, and Company officer Lipsenthal threatened Union manager Banyai in the presence of employees that Lipsenthal knew of people who could take care of Banyai. The next day, Charles DiBartolo threatened that the Company would close the shop rather than sign with the Union. Furthermore, Company supervisor Reina unlawfully interfered with the lawful strike activities of the employees who picketed in protest against the Company's unfair labor practices.

Finally, the Company violated Section 8(a)(2) and (1) of the Act by soliciting employees to sign authorization cards for Local 550, International Union of Production and Maintenance Employees and by recognizing Local 550 as the representative of its employees. This recognition came little more than one month after the Union's recognition request and the Company's discharge of numerous Union supporters.

B. Substantial Evidence on the Record as a Whole Supports the Board's Finding that the Company Interfered with the Section 7 Rights of Employees Santiago and Lyons, in Violation of Section 8(a)(1) of the Act

Section 10(e) of the Act does not foreclose court review of two incidents where the Board found Section 8(a)(1) violations. The first incident involves statements made by Company officials Vincent and Charles DiBartolo to employee Ella Santiago shortly after the July 1973 distribution of union leaflets by Local 231, Industrial Trade Union, AFL-CIO. Vincent DiBartolo stated that he had heard rumors that Santiago

was "putting the union into the girls' heads." Charles DiBartolo stated that he was going to be a "bitch" if a union came in and that he was going to get more employees if the shop was unionized so that incumbent employees would be laid off more often. It is clear that by conveying the impression that Santiago's union activities were being monitored, the Company created the unlawful appearance of surveillance.[8] It is also well settled that the threats of employer reprisals in the event of unionization such as those made by the Company here violate Section 8(a)(1).[9] Finally, the Board properly found that the raise given to prounion employee Santiago in the context of the other antiunion unfair labor practices committed during the same interview "was clearly designed to induce Santiago to support the Employer's antiunion position and to refrain from further protected union activity" (A. 35).[10]

The other Section 8(a)(1) finding reviewable by this Court involves Company official Salvatore DiBartolo's conduct in running his car at high speed into employee Rosetta Lyons, one of the employees picketing outside the Company's premises in protest against the Company's unfair labor practices. Regardless of whether DiBartolo deliberately ran Lyons down, his action and his failure to stop conveyed a clear threat to the picketing employees (A. 21). This is a clear interference with Section 7 rights and therefore a violation of Section 8(a)(1). *N.L.R.B. v. Gibbs*, 297 F.2d 649, 650-651 (C.A. 5, 1962) and cases there cited ("Inflicting,

---

[8] *N.L.R.B. v. Long Island Airport Limousine*, 468 F.2d 292 (C.A. 2, 1972); *N.L.R.B. v. S & H Grossinger's*, 372 F.2d 26, 28 (C.A. 2, 1967).

[9] *N.L.R.B. v. Yokell*, 387 F.2d 751, 756 (C.A. 2, 1967); *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 207 (C.A. 2, 1966); *N.L.R.B. v. Dixisteel Bldgs., Inc.*, 445 F.2d 1260, 1264 (C.A. 8, 1971) ("rais[ing] the spectre of . . . layoffs" as a threat violates Section 8(a)(1)).

[10] *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833, and cases there cited.

or inciting the inflicting of, violence upon union adherents to prevent or discourage union activity is an unfair labor practice"); *N.L.R.B. v. McBride*, 274 F.2d 124, 125-127 (C.A. 10, 1960); *N.L.R.B. v. Tennessee Products Corp.*, 134 F.2d 468 (C.A. 6, 1974).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING 19 EMPLOYEES FOR UNION ACTIVITIES AND THAT THE STRIKE WHICH ENSUED WAS AN UNFAIR LABOR PRACTICE STRIKE

As shown in the Statement, the top Company officials reacted to the recognition request made on the morning of September 20 by the Union representatives and the employee Committee by telling them all to get out and by firing the four Committee members. Shortly thereafter the Company officials came out of their office into the work area and fired all employees wearing Union buttons.[11] The Company's resort to massive discharges when confronted with a claim of Union majority status, in a feverish attempt to destroy the Union's support, was in flagrant disregard of the principles embodied in Section 8(a)(3) and (1) of the Act.

On the afternoon of September 20, following the discharges, the discharged employees, as well as other employees who had signed authorization cards, began picketing the plant with signs saying that they were on strike in protest against the Company's unfair labor practices. The

---

[11] Included among the dischargees were Philomena Laritza and Doris Tramont. Laritza was just about to put on her Union button when the firings in the shop occurred and was specifically told by Vincent DiBartolo to "get out" (A. 110). Tramont happened to be out in the parking lot when the firings were accomplished; Lipsenthal followed the button-wearers out to the lot and repeated that they were fired, and Tramont, who was wearing her button, correctly concluded that she was included in the mass discharge (A. 36).

Company's subsequent offer of reinstatement to the dischargees did not include offers of backpay or offers to remedy outstanding Section 8(a)(1) violations. The strike continued, and the Company committed further violations of Section 8(a)(1) as well as violations of Section 8(a)(2) (discussed *supra*, pp. 8-9, 12-13). In these circumstances the Board properly found that the strikers, including the dischargees, were at all times unfair labor practice strikers entitled to reinstatement upon their application to return to work. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956); *N.L.R.B. v. Safeway Steel Scaffolds Co.*, 383 F.2d 273, 280-281 (C.A. 5, 1967), cert. denied, 390 U.S. 955.

The Company's principal defense to the Section 8(a)(3) findings is its challenge to the Administrative Law Judge's credibility resolutions, all of which the Board accepted (A. 33, n. 1). However, as this Court has recognized, credibility resolutions are for the trier of fact and the Board and should not be upset on review absent extraordinary circumstances not present here. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (C.A. 2, 1970); *N.L.R.B. v. A & S Electronic Die Corp., supra*, 423 F.2d at 220. In the instant case the Judge's findings as to the facts surrounding the September 20 mass discharge were based on the mutually corroborative testimony of numerous witnesses for the General Counsel. The two Union representatives and the members of the employee Committee testified as to the events at the meeting between the Company and the Union on the morning of September 20. Eighteen employee witnesses testified as to the nature of the Company's

conduct on the work floor shortly after the meeting. In contrast, the testimony of the witnesses called by the Company was deficient in significant respects[12] (A. 6-7). Moreover, the Company's failure to call as witnesses Vincent and Charles DiBartolo, the principal officials responsible for the discharges, strongly suggests that their testimony would be adverse to the Company's position. *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939), See, *National Maritime Union v. N.L.R.B.*, 353 F.2d 521, 522 (C.A. 2, 1965); 2 Wigmore, *Evidence*, Sec. 285 (3 ed., 1940).[13] In sum, the Board's credibility resolutions are plainly entitled to stand.

III. THE BOARD PROPERLY ISSUED A BARGAINING ORDER AS A REMEDY FOR THE COMPANY'S UNFAIR LABOR PRACTICES

The Board found that the Union had a valid card majority of employees in an appropriate unit and that the Company's unfair labor practices were sufficiently serious to warrant a bargaining order.

---

[12] For example, the Administrative Law Judge had ample warrant for discrediting the testimony of Company witness and employee Ann Marie Cooper: After first testifying that she worked only until 4:30 p.m., and that her daughter Elizabeth Ann worked from 4:30 to 8:30 p.m., Cooper was forced to admit that her daughter never worked for the Company, but that she herself had worked overtime at straight time rates for the Company by arrangement with Company officials. Her admission that her earlier testimony as to her working hours was false and her duplicitous working arrangement with the Company both cast a shadow over her entire testimony. Moreover, Cooper's testimony as to the September 20 events at the hearing differed materially from her earlier sworn statement to the General Counsel (A. 6-7; 52-53, 196-202).

[13] Finally, the Company contended before the Board that the Union made its recognition request on the assumption that the Company would react unlawfully (A. 23). The notion that the legitimate exercise of Section 7 rights through a recognition request amounts to entrapment and provides immunity for the Company's unfair labor practices is patently baseless. Cf. *N.L.R.B. v. Star Publishing Co.*, 97 F.2d 465, 470 (C.A. 9, 1938).

With regard to the issue of the Union's majority status, the Board found that the Union obtained 24 signed authorization cards as of September 20, the date on which it requested bargaining in an appropriate unit of 42 employees (A. 15-17, 20, 33-34). Before the Board, the Company challenged the validity of three signed authorization cards, all of which unambiguously stated that the signer authorized the Union as collective bargaining representative, on the sole ground that the signers did not testify at the hearing as to the circumstances surrounding the card signing. This argument has no merit. The Supreme Court in *N.L.R.B. v. Gissel Packing Co. Inc.*, 395 U.S. 575, 606 (1969), stated that "employees should be bound by the clear language of what they sign unless the language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." There is no evidence that the challenged cards were obtained through misrepresentations or coercion in the instant case. Rather, the Administrative Law Judge credited the testimony of the solicitors of the disputed cards that in each case the employee solicited was advised that the purpose of the cards was to have the Union represent the employees (A. 20; 138, 151-152, 181-184). Hence, it is clear that the Union represented a valid majority of employees in an appropriate unit.[14]

---

[14] The Company also asserted that employee Barbara Laufman should not be included in the unit on the ground that she was a paid Union organizer. In ordering that Laufman's card be counted and that she be included in the bargaining unit, the Board said (A. 34):

> Laufman worked for the Employer for 3 months longer than some employees found to be properly included in the unit. Nothing was said when she was hired, or at any other time, that her employment was of fixed duration. She had exactly the same duties as the unit employees, worked the same hours and earned the same rate of pay. There is no evidence to show that Laufman took the job solely to organize, nor is there any evidence to show that she was not a bona fide full-time employee.

(Continued)

As for the propriety of the Board's issuance of a bargaining order, the relevant legal principles are set forth by the Supreme Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969). There the Supreme Court sustained the Board's remedial authority to issue bargaining orders in cases such as this one where unfair labor practices have been committed "that interfere with the election process and tend to preclude the holding of a fair election." 395 U.S. at 594. The Court indicated that a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view of their tendency to undermine the Union's majority and the likelihood of their recurrence in the future, "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." 395 U.S. at 614. It is well settled, as this Court has noted, that "the determination of whether unfair labor practices are of such a nature as to warrant the issuance of a bargaining order is for the Board and not the Courts." *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 79 (C.A. 2, 1973). Accord: *N.L.R.B. v. Hendel Mfg. Co.*, 483 F.2d 350 (C.A. 2, 1973); *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907 ("Appellant's attack on the use of a bargaining order must fail, moreover, in light of the Supreme Court's decision in [*Gissel*], entrusting to the Board almost total discretion to determine when a bargaining order is appropriate").

---

[14] (Continued) See, *Sears Roebuck & Co.*, 170 NLRB 533, 535 n. 1 (1968). Moreover, even if Laufman were not included in the unit, the Union would still represent a majority of 23 employees in a unit of 41 employees.

The flagrant and widespread unfair labor practices committed by the Company in the instant case plainly make a bargaining order an appropriate remedy (A. 24). As shown *supra,* the Company in July and August 1973 responded to the organizational efforts by the Teamsters and Industrial Trade Union by threats of reprisals including plant closure, by ripping up union literature, by promises of benefits, and by other coercive tactics. Thereafter, when the Union requested recognition on September 20, the Company's immediate and angry reaction was to discharge every employee evidencing support for the Union. Following the mass discharge, the Company engaged in unlawful interrogation of a group of employees; warned a Union representative, in the presence of employees, that the Company knew of people who could take care of him; told the employees that they should come to a Company supervisor if they wanted a union; and threatened that the Company would rather close down than sign with the Union. A Company official ran over an employee picketing the Company premises and a Company supervisor subjected picketing employees to threats and physical interference. Finally, the Company unlawfully assisted and recognized Local 550, after having denied recognition to the Union.[15]

Given the serious and pervasive unfair labor practices committed by the Company, the Board's issuance of a bargaining order was a proper exercise of its discretion and was well within the limits previously approved

---

15 Any suggestion that the Company's September 22 offer of reinstatement – without backpay – could have erased the traumatic effect of the mass discharge so as to make a free and fair election possible would be without merit. Its unsoundness is highlighted by the fact that the Company made no move to remedy the other unfair labor practices outstanding at the time of the offer of reinstatement, and in fact perpetrated further violations of the Act, including the unlawful assistance to, and recognition of, a rival labor organization.

by this Court. See, *N.L.R.B. v. Hendel Mfg. Co., supra,* 483 F.2d at 352-353; *M.P.C. Restaurant Corp. v. N.L.R.B., supra,* 481 F.2d at 77, 79; *N.L.R.B. v. Scolars, Inc.,* 466 F.2d 1289, 1292-1294 (C.A. 2, 1972), enforcing 192 NLRB 248 (1971); *N.L.R.B. v. International Metal Specialties, Inc., supra,* 433 F.2d at 871-872.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

MICHAEL S. WINER,
DAVID S. FISHBACK,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

May 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. DEE KNITTING MILLS, INC.; DIPPY KNITS, INC.; AND THREE D KNITTING MILLS, INC., Respondents.	)	No. 75-4016

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

John P. Rowan, Esquire
1092 East 231st Street
Bronx, New York 10466

Horowitz & Schwartz
Att: Edward Schwartz, Esq.
715 Park Avenue
East Orange, New Jersey

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 21st day of May, 1975.